MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

BRIEF FOR RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL

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August, 1974

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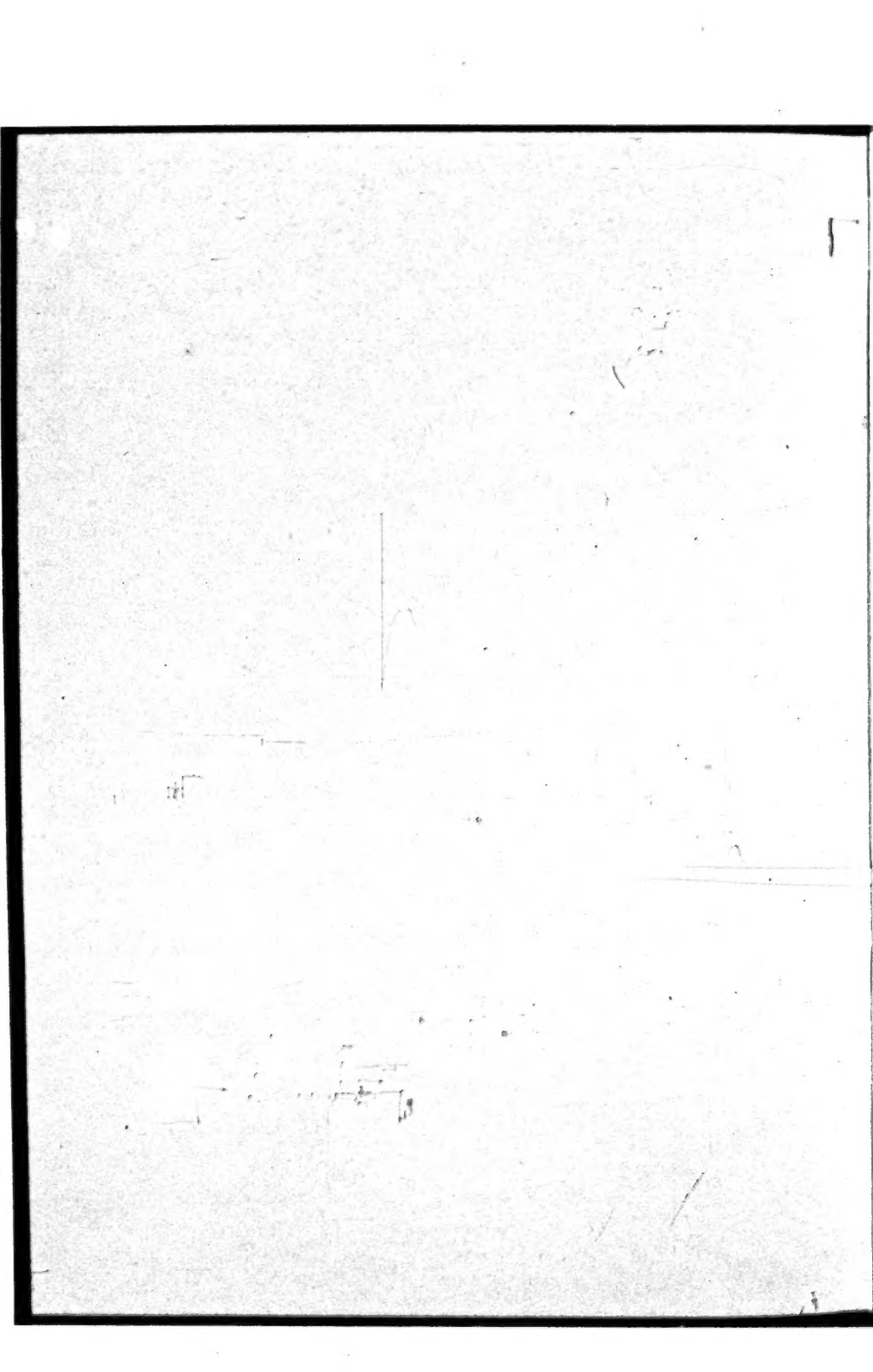

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OPINIONS BELOW

References to the opinions below are adequately set forth in petitioner's brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief.

STATUTES INVOLVED

This case involves the provisions of Section 1981 of Title 42 of the United States Code and Section 304 of Title 28 of the Tennessee Code. These statutory provisions are set forth in Appendix "A" to this brief.

QUESTIONS PRESENTED

This Court's order of June 3, 1974, granted the petition for a writ of certiorari limited to a single question which is set forth in petitioner's brief.

STATEMENT OF THE CASE

Petitioner is a Negro citizen of the United States and a resident of the State of Tennessee. He was an employee of respondent Railway Express Agency, Inc. (REA Express), from the spring of 1964 until June 20, 1967, when his employment was terminated by the company (16a-62a).[1] REA Express is a carrier engaged in the express transportation of property by railroad, truck and air. It is subject to the provisions of the Interstate Commerce Act (49 U.S.C.A., Sections 1, et seq.) and of the Railway Labor Act (45 U.S.C.A., Sections 151, et seq.). See: *Railway Express Agency, Inc.* v. *Brotherhood of Railway and Airline Clerks,* 437 F.2d 388 (5th Cir., 1972), *cert. den.* 403 U.S. 919 (1972).

While petitioner was an employee of REA Express, he was a member of respondent Lily of the Valley Local, a subordinate unit of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) (61a-63a, 88a). BRAC is the duly authorized representative

[1] Reference is to pages of the printed Appendix in this Court.

under the provisions of Section 2, Ninth, of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth) of most of the employees of REA Express. In 1952, BRAC and REA Express amended their collective bargaining agreement to fully integrate the seniority rights of REA Express members regardless of race. This integration was sustained by the Federal Courts. *Pellicer* v. *Brotherhood of Railway and Steamship Clerks,* 118 F.Supp. 254 (D.C.S.D. Fla., 1953), aff'd 217 F.2d 205 (5th Cir., 1954), *cert. den.* 349 U.S. 912.[2] It was under this seniority system that petitioner became an employee of REA Express in 1964. Under this seniority system he was able to bid for any job within his seniority district for which he was qualified. His employment began as a freight handler and he bid for and obtained a job as a driver of REA Express vehicles in the Memphis area. He was holding this job when his employment was terminated by the carrier (86a-89a). On May 31, 1967, petitioner and six other black employees of REA Express at Memphis filed a charge with the Federal Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964 (42 U.S.C.A., Sections 2000e, et seq.) against REA Express and the two respondent local unions alleging discrimination against the charging parties because of their race (15a). The EEOC investigator made no contact with any officer of the respondent unions. Instead, he queried only local officials of the carrier with respect to the unions (29a-30a). On the basis of this hearsay information,

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[2] The validity of this integration was also recently sustained in a case under Title VII of the Civil Rights Act of 1964. *Barbour* v. *REA Express, et al.* (Civil Action No. 72-235, D.C. N.D. Ala. S.D., decided October, 1973), not reported.

an investigative report was issued on December 22, 1967 (14a). This report showed, among other things, that at that time the petitioner had obtained as legal counsel Mr. Lewis R. Lucas of the law firm of Ratner, Thomson, Sugarmon, Lucas & Willis of Memphis who wished to be informed of any contact made with petitioner (31a, 32a). On March 31, 1970, the EEOC issued a decision finding reasonable cause to believe that "respondent had violated Title VII of the Civil Rights Act of 1964, and that on or about January 15, 1971, petitioner received from EEOC a notice of his right to bring suit within 30 days" (Pet. Br., 3).

No complaint was filed pursuant to the right-to-sue letter until the filing of the original complaint in Civil Action No. C-71-66 in the United States District Court for the Western District of Tennessee at Memphis on March 18, 1971 (60a).[3] This complaint was filed by an attorney appointed by the District Court on February 12, 1971, at the request of petitioner (8a). The complaint invoked the jurisdiction of the Court under Title VII of the Civil Rights Act of 1964 and Sections 1981, 1982, 1983, and 1988 of Title 42 of the United States Code. Paragraph VI of the complaint alleged that the petitioner had been denied membership in BRAC Tri-State Local, that the respondent unions did not defend the rights of Negro members in the same manner as they defended the rights of white members, and that petitioner was denied equal labor representation because of his race (63a). The respondent BRAC locals filed an answer to the complaint setting forth various legal defenses and

[3] The filing date of "March 18, 1973" appearing in the printed copy of this complaint beginning at page 60a of the Appendix is in error.

denying the allegations of racial discrimination (67a-71a).

On May 11, 1971, respondent BRAC locals filed written interrogatories to be answered by petitioner. The petitioner's answers to these interrogatories showed that the complaint was entirely without merit (77a-90a). Interrogatory No. 39 requested information as to the specific acts of the respondent BRAC locals which the petitioner sought to enjoin. The answer set forth three alleged discriminatory acts. These were (1) an alleged practice of discrimination in charging higher dues for black employees than for white employees; (2) alleged failure to give grievances of black employees proper and diligent consideration; and (3) failure to give black employees equal opportunity for advancement to supervisory positions. With respect to the dues claim, Article 27 of the BRAC Constitution provides a non-discriminatory dues structure unrelated to race. See: *Rota, et al.* v. *Brotherhood of Railway, Airline and Steamship Clerks,* 489 F.2d 998 (7th Cir., 1973), *cert. den.* 414 U.S. 1144 (1974). As to the grievance claim, petitioner at no time had ever requested either one of the respondent locals to prosecute any grievance on his behalf. In *Mendes, et al.* v. *Brotherhood of Railway and Airline Clerks,* 353 F.Supp. 137 (D.C. S.D. N.Y., 1973), District Judge Gagliardi granted BRAC summary judgment on a complaint alleging unfair handling of grievances by a plaintiff who had never submitted a grievance to the union for handling. In so doing, the District Court spoke as follows (page 141):

> "The facts underlying Evenger's suit are even less persuasive. Evenger joins Mendes in alleging unfair representation of his grievances

> concerning job abolishment, promotions and overtime and, in all but the first matter, he has not even submitted a grievance to his union. The question posed is obvious: how can a member accuse his collective bargaining agent of unfair representation when he fails to inform his agent that he is aggrieved? The answer is likewise self-evident. He cannot."

This decision was affirmed on appeal by the Second Circuit, 471 F.2d 1370 (1973), on the basis of the District Court's opinion, and a petition for certiorari was denied by this Court, 411 U.S. 971, petition for rehearing denied, 412 U.S. 963. Moreover, the petitioner did not cite any other black employee who had a grievance not prosecuted (62a, 63a, 92a).[4]

Likewise the claim concerning supervisory positions was not supported. Petitioner answered that he had no knowledge of any white employee provided training for supervisory positions with REA Express. The allegation in the complaint also related solely to the carrier and not to the respondent unions with respect to which REA Express obtained summary judgment (63a, 91a). Supervisory positions are, with a few exceptions, non-contract positions which are filled without reference to any union contract.

BRAC filed a motion to dismiss the original complaint, which was designated a "supplemental com-

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[4] The petitioner did not mention in the answers to interrogatories the claim in his complaint that he had been denied membership in BRAC Tri-State Local. However, the answers of petitioner to the interrogatories of the BRAC locals—questions nos. 7, 8, 9, 10, and 15—show that petitioner never sought membership in the Tri-State Local and had no knowledge of any by-law or rule barring him from such membership (77a-87a).

plaint", or in the alternative for summary judgment (72a). REA Express filed a similar motion (92a). On June 14, 1971, the District Court, after argument on the motions, granted the motion of the respondent BRAC locals for summary judgment on the grounds that on the basis of the undisputed facts petitioner had no grounds for relief against said respondents under the Civil Rights Act of 1964. The Court also found that insofar as petitioner sued under statutes other than the Civil Rights Act of 1964 such claims were dismissed because of failure to comply with the applicable Tennessee statute of limitations. The Court also granted REA Express summary judgment with respect to the petitioner's claim of alleged discrimination with respect to providing training for supervisory positions (92a).

The petitioner did not appeal the order of the District Court which eliminated the BRAC locals from the case. On January 14, 1972, the District Court granted the motion of petitioner's attorney to be relieved of his representation. Under the direction of the Court, the Clerk advised petitioner in writing of this action and he was allowed 30 days from January 14, 1972, to obtain other counsel or his case would be dismissed without prejudice. The 30 days went by without the Court hearing anything from petitioner and on February 15, 1972, the District Court entered an order "that this action be and the same is hereby dismissed without prejudice" (47a-48a).

The petitioner took no appeal from this order. Two days after the entry of the order of February 15, 1972, attorney William E. Caldwell wrote Chief Judge Bailey Brown of the District Court stating that petitioner had contacted counsel, that counsel was unable to represent petitioner because of the apparent discovery

expense that would be involved, that counsel had agreed to seek financial support for petitioner, and that if such support could be obtained, counsel would be willing to represent him. The letter concluded by stating that although counsel did not represent petitioner he had agreed to ask the Court to grant an additional 30 days to secure legal representation (45a). No further action was taken until May 5, 1972, when Mr. Caldwell again wrote to Chief Judge Brown stating that financial support had been obtained, that counsel was now prepared to represent petitioner, and requested that the dismissal order of February 15, 1972, be vacated and that the cause be reinstated on the docket of the Court. This letter spoke only of the action of the petitioner against the carrier REA Express and made no mention of the respondent unions (49a). Chief Judge Brown responded that since the old action had long since been dismissed the proper way to handle the matter would be the filing of a new action (51a).

Thereafter, on May 31, 1972, petitioner filed a second complaint against both REA Express and the respondent unions which contained substantially the same allegations as the complaint with respect to which the respondent BRAC locals had been granted summary judgment on June 14, 1971 (4a). The BRAC locals filed a motion to dismiss this new complaint or in the alternative for summary judgment on the grounds that the District Court's order of June 14, 1971, was *res judicata* with respect to the claims asserted in the new complaint and that such claims were barred by that order. Subsequently, the respondent BRAC locals amended the motion to include as grounds for dismissal of the new complaint the absence of jurisdiction of the Court of the subject matter thereof because the new complaint did not conform to the requirements of Sec-

tion 706(e) of the Civil Rights Act of 1964 (94a-97a). REA Express filed a similar motion (94a).

Petitioner opposed these motions by brief and in oral argument before the District Court. Petitioner made no contention to the District Court that the Tennessee statute of limitations applied by the Court in its order of June 14, 1971 (Section 304 of Title 28 of the Tennessee Code), to petitioner's claims under civil rights statutes other than Title VII of the Civil Rights Act of 1964 was tolled by reason of a filing of a charge with the Federal EEOC pursuant to Section 706 of the 1964 Act. Petitioner's arguments to the District Court on the application of the Tennessee statute of limitations were limited to the contentions that the wrong statute had been applied. On January 25, 1973, the District Court issued its opinion and order granting the motions of the carrier and of the respondent BRAC locals (98a-104a).

The judgment of the District Court was affirmed by the Court of Appeals for the Sixth Circuit. In its original opinion, the Court of Appeals did not specifically deal with the action of the District Court with respect to its holding that the order of June 14, 1971, was *res judicata* with respect to the claims of the petitioner against the respondent locals. The obvious reason was that the petitioner all but abandoned any argument he had on this point as his brief to the Court of Appeals contained only two short paragraphs dealing with the issue in cursory fashion. However, the Court of Appeals did specifically deal with and reject the argument of the petitioner to the Court that the Tennessee statute of limitations was tolled by the filing of a charge with the Federal EEOC

(105a-113a). Moreover, in its opinion and order on rehearing the Court of Appeals specifically affirmed the holding of the District Court that the respondent BRAC locals had a complete defense to the second complaint on the grounds of *res judicata.* The holding of the Court of Appeals on this issue reads as follows (115a):

> "The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. *We agree with the District Court that the unions have a complete defense on the ground of res judicata,* and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned." (Emphasis supplied).

As a consequence, the petition for certiorari set forth as one of the questions for review the following issue (Pet., page 3):

> "As to his causes of action under either statute,[5] an interlocutory order granting unopposed motions for summary judgment in an action subsequently dismissed without prejudice for failure to obtain counsel has *res judicata* effect."

This Court granted the petition for certiorari only with respect to the issue of the tolling of the application

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[5] In the context of the petition the reference is to Section 1981 of Title 42 of the United States Code and Title VII of the Civil Rights Act of 1964. It should also be observed that the statement of petitioner that the motion of the respondent BRAC locals for summary judgment was unopposed was incorrect. The District Court's order of June 14, 1971, specifically states that the motion was granted upon consideration and after argument of counsel (92a).

of the Tennessee statute of limitations to an action under Section 1981 by the filing of a charge with the EEOC under Title VII of the Civil Rights Act of 1964.

ARGUMENT

I

Final Judgment Has Been Rendered With Respect to the Petitioner's Claims Against the Respondent Unions

The District Court granted the motion of the respondent BRAC locals to dismiss the second complaint or for summary judgment thereon on the grounds that the Court's order of June 14, 1971, was *res judicata* with respect to the claims of the petitioner against these respondents set forth in said second complaint (101a). The Court of Appeals affirmed this holding stating that "We agree with the District Court that the unions have a complete defense on the grounds of res judicata" (115a). The petitioner in his petition for certiorari asked this Court to review this holding of the Court of Appeals. This Court denied this request by limiting its grant of the petition to the single issue of the tolling of the Tennessee statute of limitations. In his brief the petitioner states that the *res judicata* issue should be remanded to the Court of Appeals for reconsideration and clarification. The reason given for this contention in footnote 7 on page 8 of the brief is that the order of summary judgment was interlocutory and was limited to petitioner's Title VII claims. However, the claims of petitioner under both statutes were identical as the decision of the Court of Appeals recognized when it said that the District Court's order of June 14, 1971, constituted a complete defense for the respondent unions to petitioner's claims. Petitioner himself also recognized this fact

by asking the Court to review this judgment in his petition for certiorari and described the judgment as a "ruling of the court below affirming the dismissal of * * * (c) petitioner's claims, under both statutes, against the unions and, as to failure to train, against REA, on the ground of *res judicata* * * * " (Pet., page 12).

The denial by this Court of the petition for certiorari on the *res judicata* issue constitutes a final judgment in the case in favor of the respondent BRAC locals.

II

The Running of the Tennessee Statute of Limitations Should Not Be Tolled by Petitioner's Filing of a Charge of Employment Discrimination with the Federal EEOC Under the Civil Rights Act of 1964

The petitioner was discharged from employment by the carrier on June 20, 1967. His original complaint was filed with the United States District Court for the Western District of Tennessee on March 18, 1971, or approximately three years and nine months later. This was long after the limitation provided by the applicable Tennesse statute of limitations. The second complaint, upon which the petitioner now wishes to proceed, was not filed until May 31, 1972, or almost five years after the petitioner's employment with the carrier ceased.

Petitioner filed his charge with the EEOC on September 6, 1967.[6] Petitioner's brief (pp. 9, 10) argues that if the applicable Tennessee statute of limitations was not deemed tolled by the filing of this charge, petitioner would have had to file suit under Section 1981

[6] The original charge was filed on May 31, 1967, but was amended on September 6, 1967.

without waiting for the resolution of his charge to the EEOC. Petitioner argues that this would be unfair because Title VII is in some instances a better remedy under which to litigate employment discrimination claims. However, a holding that the Tennessee statute of limitations was not deemed tolled by the filing of the EEOC charge does not mean that the petitioner could not have taken advantage of Title VII to litigate his employment discrimination claims. Under the statute as it stood at the time the original complaint was filed in this case, an individual who had filed a charge with the EEOC of employment discrimination could request a right-to-sue letter when that charge had been pending for 60 days before the EEOC.[7] As a practical matter, a substantial part of all litigation under Title VII has been based upon such right-to-sue letters without any processing of the charge by the EEOC. Indeed, it has become a matter of public knowledge that the channels of EEOC are clogged with so many thousands of charges of discrimination in employment practices that it is impossible for it to deal with these charges within the time limits provided by the statute. This court in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), limited the legal prerequisites to the bringing of a Title VII action to the filing of an EEOC charge and a right-to-sue letter. Thus, the tolling of the state statute of limitations with respect to a Section 1981 action is neither legally nor practically necessary in order to bring a Title VII action.

Petitioner's brief (pp. 11, 12) also argues that from the point of view of an individual with limited re-

[7] Under the amendments effective March 24, 1972, an individual is entitled to such a right-to-sue letter after a period of 180 days.

sources it is more desirable to file a charge under Title VII and thus have made available to him the full resources of the EEOC than to commence litigation under Section 1981. The fact that the statute recognizes the need to bring suits without the EEOC fully processing discrimination charges and the fact that a substantial number of such suits are brought substantially weakens this argument. However, in the case of this particular statute of limitations, there is a whole year period during which Title VII relief can be undertaken and under other state statutes the period is longer. Nor is the only public interest involved the interest of a person claiming employment discrimination. The public interest bases of statutes of limitations is to require the prompt and orderly processing of claims before they have become stale. It is not in the interest of individuals claiming employment discrimination or in the public interest to establish a rule of law which permits the processing of stale claims. Yet, it is clear that this would be the practical effect of petitioner's position. In the present case, even if the original complaint had gone to trial on February 2, 1972, as scheduled, the petitioner's claim would have been before the Court almost five years after the events took place. The need to process employment discrimination claims before they become stale is recognized by Title VII itself by authorizing individuals to seek a right-to-sue letter after the expiration of a period of time which was originally two months and now extends to six months. With the well established log jam which exists with respect to the processing of employment discrimination claims before the EEOC, the petitioner's position would mean even longer periods of time would elapse before a claim was brought to Court.

The petitioner's argument that the filing of the EEOC charge meets the policies underlying statutes of limitations of fairness to defendants with respect to stale claims by providing notice is wholly without merit. In the first place, Federal Courts have consistently held that the claims set forth in a Title VII Court complaint are not limited to those contained in the EEOC charge. *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir., 1970); *Tipler* v. *E. I. duPont deNemours & Co.*, 443 F.2d 125 (6th Cir., 1971). This means that a defendant, as a practical matter, may not have notice of what will ultimately be the essence of the Court complaint. Second, under the 1972 amendments to Title VII the EEOC is no longer required to serve copies of charges upon respondents so that all that the respondent receives is a notice that a charge of discrimination has been filed. Third, there are decisions holding that a Title VII complaint can proceed in a Federal Court even if the respondent is never served at all. *Johnson* v. *ITT-Thompson Industries, Inc.*, 323 F.Supp. 1259 (N.D. Miss., 1971); *Pullen* v. *Otis Elevator Co.*, 292 F.Supp. 715 (N.D. Ga., 1968); *Holliday* v. *Railway Express Co., Inc.*, 306 F.Supp. 898, 901 (N.D. Ga., 1969); *Logan* v. *General Fireproofing Co.*, 309 F.Supp. 1096 (W.D. N.C., 1969). The filing of a Title VII charge clearly does not guarantee any kind of notice to a respondent.

The petitioner argues that the decision of the Court of Appeals not recognizing the tolling of the state statute of limitations is incompatible with the flexible approach to overlapping remedies in employment discrimination cases and if allowed to stand would interfere substantially with the successful administration of Title VII. However, the fact is that Section

1981 is commonly thrown into complaints based on Title VII principally for the purpose of avoiding defects in the complaint arising out of failure to comply with one or more of the requirements of Title VII. Such is the present case. It would be a rare case, if any, in which a Section 1981 action was based upon some facts other than those involved in the Title VII claim. This is clearly demonstrated by the present case. Petitioner's whole argument is simply an effort to keep alive claims which have been dismissed by the District Court under Title VII, affirmed by the Court of Appeals, and which this Court refused to review on a petition for certiorari. Thus, the use which would be made of a ruling tolling the application of a state statute of limitations to a Section 1981 action would be the further encouragement of litigation of stale claims, not advancement of the purposes of Title VII.

Petitioner also cites the decision in *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (1973), to support an argument that the tolling principle should be recognized in the situation here involved to carry out the Congressional policy in Title VII of favoring informal methods of settling and conciliation. Such undoubtedly was the purpose of Congress in enacting Title VII. However, this principle has been more honored in the breach than it has been applied. The statute itself discourages conciliation by allowing petitioners to request right-to-sue letters after a minimum lapse of time. The 1972 amendments to the statute discourage conciliation by not requiring the charge to be served on the respondent. The decisions applying Title VII holding that conciliation is not a legal requirement for a suit discourage conciliation. Title VII has become not much more than a vehicle for filing a charge and

after a minimum length of time requesting a right-to-sue letter. Finally, conciliation is impossible in a substantial number of cases because the clogged docket of the EEOC prevents it from getting that far. A decision supporting the petitioner's position on tolling will not change any of these decisions or any of these problems, all of which have combined to make the Congressional objective of conciliation almost meaningless.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the Court of Appeals on the issue of tolling the Tennessee statute of limitations with respect to petitioner's claim under Title 42, Section 1981, of the United States Code should be affirmed.

Respectfully submitted,

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August, 1974

APPENDIX

APPENDIX A

1. Provisions of Section 1981 of Title 42 of the United States Code:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Provisions of Section 304 of Title 28 of Tennessee Code:

> **28-304. Personal tort actions—Malpractice of attorneys—Civil rights actions—Statutory penalties.**—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued. For the purpose of this section, insofar as products liability cases are concerned, the cause of action for injury to the person shall accrue on the date of the personal injury not the date of the negligence or the sale of a product. The preceding sentence shall not apply to causes of action accruing prior to May 20, 1969. [Code 1858, § 2772 deriv. Acts 1715, ch. 27, § 5); Shan., § 4469; mod. Code 1932, § 8595; Acts 1967, ch. 283, § 1; 1969, ch. 28, § 1; 1969, ch. 293, §§ 1, 2.]